



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 10, 2003

Ms. Joanne Wright
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2003-3968

Dear Ms. Wright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182439.

The Texas Department of Transportation (the "department") received twenty-one requests from the same requestor for a variety of information pertaining to "current project(s) for the acquisition of land for highway right of way in your district for state highway purposes." You claim that the requested information is excepted from disclosure pursuant to section 552.105 of the Government Code. We have considered the exception you claim and have reviewed the submitted representative sample documents.¹

Initially, we note that a small portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

¹ We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). The submitted information contains information, which we have marked, that is encompassed by these three categories of information under section 552.022. The department must release the marked information that is subject to section 552.022(a)(1) to the requestor, unless it is expressly confidential under other law or is excepted from disclosure under section 552.108 of the Government Code. The department must also release the marked information that is subject to sections 552.022(a)(3) and (a)(5), unless it is expressly confidential under other law. The department claims that all of this particular marked information is excepted from disclosure pursuant to section 552.105 of the Government Code. However, we note that section 552.105 is a discretionary exception to disclosure under the Public Information Act that does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 564 (1990) (governmental body may waive statutory predecessor to section 552.105).² Accordingly, we conclude that the department may not withhold any portion of this marked information under section 552.105 of the Government Code.

However, we note that a portion of the document that is subject to section 552.022(a)(3) of the Government Code is excepted from disclosure pursuant to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides:

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, we conclude that the department must withhold the bank account number that we have marked within the document that is subject to section 552.022(a)(3) pursuant to section 552.136 of the Government Code.

We note that portions of this marked section 552.022 information are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, we conclude that the department must release this marked section 552.022 information to the requestor in compliance with applicable copyright law.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted so long as the transaction relating to those negotiations is not complete. *See* Open Records Decision

No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. See Open Records Decision No. 564 (1990).

You state that the department is in the process of acquiring property necessary for various road construction projects and that the requested information pertains to the appraisal or purchase price of real property that the department intends to purchase. You also state that the release of the requested information may give property owners and others insight into developers' plans for detailed routing of highways which, in turn, could fuel speculation and drive up prices. Finally, you state that the release of addresses and locations associated with these properties would harm the department's ability to negotiate with landowners of such properties and could permit third parties to affect the department's negotiating process with such landowners. Based on our review of your arguments and the remaining submitted information, we agree that section 552.105 is applicable to this information. Accordingly, we conclude that the department may withhold the remaining submitted information at this time pursuant to section 552.105 of the Government Code.

In summary, the department must release the marked section 552.022 information to the requestor in compliance with applicable copyright law after having first redacted the bank account number in the document that is subject to section 552.022(a)(3) pursuant to section 552.136 of the Government Code. The department may withhold the remaining submitted information pursuant to section 552.105 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the

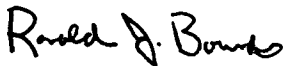
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 182439

Enc. Marked documents

c: Mr. Elliott Mitchell
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(w/o enclosures)